

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12020-mg

- - - - -x

In the Matter of:

RESIDENTIAL CAPITAL, LLC, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

December 16, 2015

10:02 AM

B E F O R E:

HON. MARTIN GLENN

U.S. BANKRUPTCY JUDGE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Doc# 9364, 9311 Status Conference on ResCap Borrower Claims
Trust's Seventy-Fifth Omnibus Objection to Claims (No Liability
Borrower Claims) Solely as it relates to the Claim Filed by
Rhonda Gosselin.

(CC: Doc# 9355, 9359) Motion for Relief from Stay.

(CC: Doc# 9280, 9328, 9393) Hearing RE: ResCap Borrowers Claim
Trust's Objection to Claim Nos. 4757, 4758, 4762, and 4764
Filed By Patricia McNerney and Susan Gray.

(CC: Doc# 9334) Motion to Strike Affidavit of Sara Lathrop
Filed in Support of Objections to Claims 4757, 4758, 4762, 4764
Filed in Document 9280.

(CC: Doc# 9333) Motion to Strike Affidavit of David Wallace
Filed in Support of Objection to Claims 4757, 4758, 4762, and
4764 as Document Number 9280.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

(CC: Doc# 9296) ResCap Borrower Claims Trust's Ninetieth
Omnibus Objection to Claims ((I) No Liability Borrower Claims,
(II) Reduce and Allow Borrower Claims, and (III) Allowed in
Full Borrower Claim) Reset for 1/21/2016 at 10:00 a.m. as to
Claim Filed by Mary R. Biancavilla. The hearing as to all
other claims will be going forward.

(CC: Doc# 9310) ResCap Borrower Claims Trust's Objection to
Proof of Claim No. 5857.

Transcribed by: Aliza Chodoff
eScribers, LLC
700 West 192nd Street, Suite #607
New York, NY 10040
(973)406-2250
operations@escribers.net

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S :

MORRISON & FOERSTER LLP

Attorneys for ResCap Borrower Claims Trust
250 West 55th Street
New York, NY 10019

BY: JORDAN A. WISHNEW, ESQ.
JESSICA J. ARETT, ESQ.

CARPENTER LIPPS & LELAND LLP

Attorneys for ResCap Liquidating Trust
280 North High Street
Suite 1300
Columbus, OH 43215

BY: DAVID A. WALLACE, ESQ. (TELEPHONICALLY)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

SUSAN M. GRAY, ATTORNEY AT LAW

Attorney for Patricia McNerney

22255 Center Ridge Road

Suite 210

Rocky River, OH 44116

BY: SUSAN M. GRAY, ESQ.

MCINTYRE THANASIDES BRINGGOLD ELLIOTT GRIMALDI & GUITO, P.A.

Attorneys for Mary McDonald

501 East Kennedy Boulevard

Suite 1900

Tampa, FL 33602

BY: JOHN HIGHTOWER, JR., ESQ. (TELEPHONICALLY)

ALSO PRESENT:

RHONDA L. GOSSELIN, Party Pro Se (TELEPHONICALLY)

SARA M. LATHROP, Senior Claims Analyst, ResCap Borrower

Claims Trust (TELEPHONICALLY)

1 P R O C E E D I N G S

2 THE COURT: All right, please be seated.

3 We're here in Residential Capital, number 12-12020.

4 Mr. Wishnew.

5 MR. WISHNEW: Good morning, Your Honor. Jordan

6 Wishnew, Morrison & Foerster, for the ResCap Borrower Claims
7 Trust.

8 Your Honor, I'm happy to report, as your chambers has
9 acknowledged, that the Connecticut HFA matter has been
10 resolved. So with those -- that order entered, we are going to
11 save ourselves a lot of paper going forward on future agendas,
12 as well as the Court's time.

13 So that brings us to the first matter going forward
14 this morning, the case management and the status conference for
15 the ResCap Borrower Claims Trust seventy-fifth omnibus
16 objection to claims as it pertains to the plaintiff Rhonda
17 Gosselin. It's at the bottom of page 8 of today's agenda. I
18 believe Ms. Gosselin is on the phone.

19 THE COURT: Ms. Gosselin, are you on the phone?

20 MS. GOSSELIN: Yes, this is Rhonda Gosselin.

21 THE COURT: Thank you.

22 MR. WISHNEW: Your Honor, this is a matter which I
23 know the Court is familiar with. It is a claim that was
24 res -- where there's a prior decision issued by the Court
25 sustaining in part and overruling in part the Borrower Trust

1 Claims objection to Ms. Gosselin's claim.

2 We had served discovery on Ms. Gosselin's counsel,
3 Laird Heal, back --

4 THE COURT: Yes.

5 MR. WISHNEW: -- in the beginning of September.
6 Subsequently, he was removed from the practice of law in
7 Massachusetts and unable to represent Ms. Gosselin. For
8 reasons I won't get into, we haven't been able to have a status
9 conference until today. We have -- we, the Borrower Claims
10 Trust, had made an initial settlement offer to Ms. Gosselin,
11 which she respectfully declined. So at this point, we are
12 looking for the Court's guidance as to how to move forward most
13 efficiently to bring this matter to a resolution.

14 THE COURT: Okay. Ms. Gosselin, have you been able to
15 obtain new counsel?

16 MS. GOSSELIN: Rhonda Gosselin. No, I haven't.

17 THE COURT: Are you going to proceed without counsel?

18 MS. GOSSELIN: Rhonda Gosselin. No.

19 THE COURT: I guess I don't understand your response.
20 I mean, Mr. Heal, who was your counsel, had to withdraw, and
21 that's occurred. So you're now -- unless you get new counsel,
22 you're appearing on your own. That's okay. You're permitted
23 to do that. It's unquestionably difficult for borrowers to
24 proceed without counsel. Going back in time, the Trust had
25 objected to your claim, and I had entered a written opinion and

1 order sustaining in part and overruling in part the Trust Claim
2 objection to your claim. So part of your claim survives.

3 The question is how we go forward. If you want to
4 move forward and try and prevail on your claim, you're going to
5 have to do it either on your own or with a new lawyer. At this
6 stage, obviously, I'm not -- settlement is entirely voluntary.
7 It -- I don't force anybody to enter into settlements. And I
8 know you've -- that's been pursued with the Trust, I assume,
9 and it's been unsuccessful at this point.

10 So I need to enter a scheduling order to move forward.
11 So I mean, it's your call, Ms. Gosselin, as to -- do you wish
12 to proceed with your remaining claim against the Trust? Are
13 you going to abandon the claim if you're going to proceed on
14 your own, which you're entirely permitted to do. I'll enter a
15 scheduling order, we'll move forward. I don't know whether
16 there are any discovery issues that you want to raise, Ms.
17 Gosselin, or Mr. Wishnew, that you want to raise.

18 MR. WISHNEW: Your Honor, we had previously served
19 counsel with discovery in the form of request for admissions,
20 some document requests, and those went -- we received no
21 responses in a timely manner. So we would propose to reissue
22 those, but would willing to move forward expeditiously with a
23 truncated discovery --

24 THE COURT: Sure.

25 MR. WISHNEW: -- schedule.

1 THE COURT: So Ms. Gosselin, tell me, what do you want
2 to do?

3 MS. GOSSELIN: Rhonda Gosselin. I don't understand
4 the -- everything fully. Laird Heal was my fifth attorney. I
5 guess I'm unable to find an attorney to really represent
6 me -- my case. I don't agree with a lot of it, so I don't know
7 if it should go forward to a different court. This is what I
8 don't understand. But I'll --

9 THE COURT: You -- Ms. Gosselin --

10 MS. GOSSELIN: -- I have no idea of --

11 THE COURT: -- Ms. Gosselin, it's going forward before
12 me. I mean, that's -- you filed a proof of claim in the ResCap
13 bankruptcy. The Trust objected to the claim. I overruled
14 their objection in part and sustained it in part, so
15 there -- do you have a copy of my written opinion?

16 MS. GOSSELIN: Rhonda Gosselin. Yes, I do. I have
17 some information, but I don't know if I'm missing information.
18 I don't know. I've been really sick, so Laird hasn't kept in
19 touch with me that much --

20 THE COURT: Okay.

21 MS. GOSSELIN: -- on the details.

22 THE COURT: Sure. Well, what I'm -- let me ask this.
23 And I'm -- I didn't realize that you had been through so many
24 counsel before Mr. Heal. Mr. Heal appeared before me in some
25 other ResCap matters as well so -- that were also affected by

1 the fact that he had to withdraw. I just want to be clear on
2 this. I think you've answered it clearly. But are you making
3 any effort to find replacement counsel?

4 MS. GOSSELIN: I -- Rhonda Gosselin. I have been
5 searching for counsel for -- since 2009 --

6 THE COURT: Okay.

7 MS. GOSSELIN: -- basically. And the only ones I
8 found me that helped me the most was Laird Heal.

9 THE COURT: Yeah.

10 MS. GOSSELIN: At this moment, I don't have the money
11 to hire the right attorney to take -- handle this matter.
12 There's more going on than what you're seeing. It's really
13 complicated -- to me, it's very complicated.

14 THE COURT: Sure.

15 Mr. Wishnew, what are the remaining factual or legal
16 issues with respect to Ms. Gosselin's surviving claim?

17 MR. WISHNEW: Your Honor, one moment. The surviving
18 claims deal with the issue of wrongful foreclosure, whether
19 there's a claim under Chapter 93(a) of the Massachusetts
20 General Laws, as well as a claim under another Massachusetts
21 consumer debt statute.

22 THE COURT: All right. Mr. Wishnew, submit a proposed
23 case management and scheduling order that includes ninety days
24 for fact discovery, forty-five days for expert discovery, get a
25 date from Deanna for the next case management and scheduling

1 conference. It should occur shortly before -- find it -- if
2 there are omnibus hearing dates, a few weeks before the close
3 of the fact discovery period.

4 Ms. Gosselin, I -- at this stage, I have no choice but
5 to move forward. I'm actually being maybe more generous than I
6 otherwise would with the amount of time that I'm permitting.
7 And it's certainly no fault of yours that Mr. Heal had to
8 withdraw as counsel. I'm -- I just want to make clear -- and
9 if you're able to find other counsel, the sooner the better.
10 But the matter has to go forward. I can't continue to carry it
11 longer without action. It's important that the remaining
12 ResCap matters get resolved. Distributions to all borrowers
13 with allowed claimed depends upon closing as many of the
14 borrower matters as possible. And a lot of time has passed
15 already.

16 As I say, I recognize it's through no fault of your
17 own that Mr. Heal had to withdraw. But you'll get a
18 copy -- I'll make sure -- Mr. Wishnew, make sure that Ms.
19 Gosselin -- do you have your address, Mr. --

20 MR. WISHNEW: I do, Your Honor.

21 THE COURT: Okay. That she gets a copy of this
22 proposed -- of the case management and scheduling order. I am
23 going to enter it.

24 MR. WISHNEW: Okay.

25 THE COURT: And we'll move forward from there.

1 Ms. Gosselin, I -- you'll -- if you're going to
2 litigate, you can litigate on your own. You can find new
3 counsel. It's important when I enter this order that counsel
4 know those dates aren't going to be changed at this point. And
5 after the discovery period, the case will be set for trial.
6 You'll have to be here for the trial. It has to be done in
7 person. I don't do those over the phone. I'm certainly --
8 will permit you to appear at any case management conference by
9 telephone, not having to come down here. And when I set a
10 trial date -- if we set a trial date -- I try to do it
11 as -- dates that are mutually convenient to both sides. So I
12 won't sort of unilaterally do that without you having a say in
13 it. But in terms of the discovery period, that's got to go
14 forward now.

15 I encourage you, Ms. Gosselin, to continue to try to
16 resolve the matter through settlement with the Trust. But
17 that's completely -- I don't strong-arm anybody into
18 settlement. You're entitled to your day in court. And when
19 Mr. Heal was representing you, you were at least partially
20 successful, because part of your claim survived. Issues under
21 the Massachusetts statutes that remain in play -- 93(a) and a
22 consumer protection statute -- are complicated issues. I don't
23 dispute that, but that's what we're going to have to do.

24 So you'll get a copy of the order.

25 Mr. Wishnew, I encourage you to continue to try and

1 talk to Ms. Gosselin and see whether you can resolve it.
2 You'll keep me posted if -- not on the details of any
3 settlement --

4 MR. WISHNEW: Of course.

5 THE COURT: -- obviously, but if you're able to
6 resolve it. And I'll enter the case management scheduling
7 order, and we'll move forward on that basis. And --

8 MR. WISHNEW: Thank you, Your Honor.

9 THE COURT: -- I'm just making clear, I'm not at this
10 stage, given the amount of time that's passed, those dates are
11 going to stick.

12 MR. WISHNEW: Understood, Your Honor.

13 THE COURT: Okay?

14 MR. WISHNEW: Yeah.

15 THE COURT: All right. Ms. Gosselin, thank you very
16 much for participating by telephone today.

17 MS. GOSSELIN: Rhonda Gosselin. Thank you.

18 THE COURT: Okay.

19 MR. WISHNEW: Your Honor, the next matter on today's
20 calendar is under page 10 under Section 4 of the agenda,
21 Contested Matters. It's the petition of Patricia McNerney and
22 Susan Gray, preliminary relief from the automatic stay. I
23 believe Ms. Gray's in the courtroom.

24 THE COURT: Come on up, Ms. Gray.

25 MS. GRAY: Good morning, Your Honor. I'm Susan Gray.

1 I'm representing Patricia J. McNerney with regard to two claims
2 and also attorney fee claims that, under Ohio law, belong to
3 the attorney. And therefore, I filed separate claims for those
4 just to avoid any concern about the hypertechnicality of the
5 claims process, that --

6 THE COURT: Okay.

7 MS. GRAY: -- those claims would have been lost. So
8 I'm here on a motion for relief from stay and also on the Trust
9 objection to our claims and on two --

10 THE COURT: Well, let me deal first with the motion
11 for relief from stay. I've read all the papers. They're quite
12 voluminous on everything. And the motion from relief from stay
13 is denied. I've gone through -- in this circuit, we apply the
14 Sonnax case from the Second Circuit with twelve factors. I've
15 gone through, reviewed the pleadings, reviewed the history of
16 the litigation in the Northern District of Ohio.

17 When your client and you filed a proof of claim in
18 this court, the law is quite clear. You submit to the
19 equitable jurisdiction of the bankruptcy court to resolve those
20 claims as part of the claims allowances process. It's only in
21 fairly rare circumstances that I will lift the stay to permit
22 litigation to be resolved elsewhere, even to fix the amount of
23 the claims, which is what you're asking to be able to do.

24 One of the things that neither party had called to my
25 attention is that Judge Lesley Wells, the district judge in the

1 Northern District of Ohio, before whom the matter has been
2 pending, retired from the bench in early October 2015.

3 MS. GRAY: News to me, Your Honor.

4 THE COURT: Okay. So the history of this case, as
5 I've looked carefully, there was the prior litigation first in
6 state court.

7 MS. GRAY: Correct.

8 THE COURT: And I guess it was a trial, but no
9 decision.

10 MS. GRAY: Exact, Your Honor.

11 THE COURT: And then, that was the first foreclosure
12 action, and you had counterclaims -- your client -- you filed
13 counterclaims on that on behalf of your client. That was
14 ultimately dismissed. The second foreclosure action was filed
15 in federal court in the Northern District of Ohio. It was
16 before Judge Wells. You filed counterclaims again. You added
17 some additional counterclaims. The debtor, before bankruptcy,
18 filed a motion for judgment on the pleadings and a motion for
19 summary judgment.

20 While those matters were briefed, before there was any
21 decision, the debtors filed their Chapter 11 case here. The
22 case in the Northern District of Ohio was stayed as a result of
23 the bankruptcy. I guess Judge Wells was a senior judge when
24 the matter before him (sic) was pending.

25 MS. GRAY: Her, Your Honor.

1 THE COURT: And he'd been a senior judge for about
2 seven or eight years, but he retired -- Judge Wells retired
3 from the bench, I think it was either October 2nd or 5th, 2015.
4 So there is nobody in that court with familiarity about any of
5 these proceedings.

6 Your motion papers that you filed here, your response
7 to the objection essentially duplicates the pleadings in what
8 were the pending motions before Judge Wells at the time that
9 the bankruptcy interceded. So I've considered each of the
10 twelve Sonnax factors and concluded that they weigh heavily in
11 favor of the McNerney and Gray claims being adjudicated here as
12 part of the claims allowance process. One of the things you
13 argue is, mistakenly, that Ms. McNerney would be entitled to a
14 jury trial. And that's not correct.

15 MS. GRAY: I agree, Your Honor.

16 THE COURT: Okay, that when you file a proof of claim
17 you submit to the equitable jurisdiction --

18 MS. GRAY: Right.

19 THE COURT: -- and there is no jury.

20 So I'll simply enter an order, and ask Mr. Wishnew to
21 prepare it, that for the reasons stated the motion to lift the
22 stay is denied. But I do want to go on and hear argument with
23 respect to the Trust objection to the claims.

24 On that score, we'll let Mr. Wishnew argue first, and
25 then you'll have a chance to respond, okay?

1 MS. GRAY: Thank you, Your Honor. May I ask one
2 question, though --

3 THE COURT: Sure, go ahead.

4 MS. GRAY: -- with regards to the lift from the stay?
5 In the -- with regard to the underlying issues, there is one
6 witness who is a hostile witness, who is located in Ohio. And
7 I guess if we go to trial, we'll have to do it by video or
8 something.

9 THE COURT: No, we don't do any -- I don't -- there's
10 one of two things. You're assuming you're going to get to
11 trial. We'll see whether you get to trial. The -- you can
12 take the witness' deposition. You can take it as a video
13 deposition. And when I have a trial, it's not uncommon to have
14 witness testimony presented by deposition, designations,
15 counterdesignations, et cetera, including video depositions.
16 And so that's -- I can't -- if the witness is outside the
17 subpoena power of the Court, the witness can't be forced to
18 attend in court. But that doesn't prevent you from taking the
19 deposition and taking a video deposition, if that's what you
20 choose to do. So --

21 MS. GRAY: We'll work it out, Your Honor.

22 THE COURT: I mean, that's not uncommon.

23 MS. GRAY: Okay.

24 THE COURT: Okay?

25 MS. GRAY: Thank you.

1 THE COURT: All right, thanks very much.

2 Mr. Wishnew?

3 MR. WISHNEW: Thanks, Your Honor.

4 THE COURT: Let me just make a note, okay?

5 Okay.

6 MR. WISHNEW: Thank you, Your Honor. Jordan Wishnew,
7 Morrison & Foerster for the ResCap Borrower Claims Trust.

8 The next matter on today's agenda is under Section 5
9 of the agenda on page 10, item 6, which is the ResCap Borrower
10 Claims Trust objection to claim numbers 4757, 4758, 4762, and
11 4764, filed by Patricia McNerney and Susan Gray, docket number
12 9280. The Borrower Trust -- sorry, Ms. McNerney or the
13 claimants filed a response to the objection at docket number
14 9328. The Borrower Trust filed a reply in support of the
15 objection at docket number 9393. The Borrower Trust's reply
16 also addressed to motions to strike that were filed by the
17 claimants, which were filed at docket numbers 9333 and 9334.

18 Your Honor, through the objection, after thoroughly
19 examining the debtors' books and records, the Borrower Trust
20 seeks to expunge the claimants' proofs of claim because they do
21 not sufficiently allege how the debtors' actions gave rise to
22 liability for the stated causes of action. In support of the
23 objection and the reply, the Borrower Trust submitted a
24 declaration of Sara Lathrup, senior claims analyst to the
25 Borrower Trust, as well as the declaration of David Wallace,

1 co-counsel to the ResCap Liquidating Trust. Both Mr. Wallace
2 and Ms. Lathrup are on the phone today and available to answer
3 any questions the Court may have.

4 The claimant asserts eleven causes of action related
5 to alleged wrongdoing that occurred during the brokering and
6 origination of Ms. McNerney's loan in December 2002. I
7 recognize the Court has thoroughly read all the submissions, so
8 I will not repeat our arguments as to why each cause of action
9 is devoid of merit. However, I do want to address one point
10 that relates to a majority of the causes of action. Seven of
11 eleven causes of action are premised on the wrongdoing of Ms.
12 McNerney's mortgage broker, OMC Lending, not the actions of
13 Homecomings.

14 The claimants assert that Homecomings' alleged
15 liability for these seven causes of action derive from the
16 claimants' mistaken legal theory that Homecomings is
17 responsible for the actions of OMC because OMC was purportedly
18 acting as Homecomings' agent. However, this argument fails, as
19 a matter of law, as there is no evidence of either an expressed
20 or implied agency relationship between OMC and Homecomings with
21 regard to the origination of loans.

22 And just for completeness, Your Honor, the seven
23 causes of action, based upon the allegations made in the
24 claimants' pleadings, tie to the agency principal arguments are
25 breach of fiduciary duty, negligence, improvident lending, the

1 Ohio Consumer Sales Practice Act, the Ohio Mortgage Broker
2 Act --

3 THE COURT: Just a second. I want to make some notes.

4 MR. WISHNEW: I'm sorry. I'll start over.

5 THE COURT: No, I'm with you so far.

6 MR. WISHNEW: Okay. Ohio Mortgage Broker Act, fraud,
7 intentional misrepresentation, and negligent misrepresentation.

8 THE COURT: Okay.

9 MR. WISHNEW: The --

10 THE COURT: So that's where I -- I mean, I -- yes, it
11 appears to me that each of those causes of action depends on
12 whether OMC was Homecomings' agent, either on actual authority,
13 apparent authority, agent by estoppel. So one of the things
14 that I've tried to focus on and ask both counsel to address is
15 what does the -- and again, there hasn't been an evidentiary
16 hearing. But because claim objections involving a shift --
17 involve a shifting burden, and while a properly prepared proof
18 of claim is prima facie evidence of validity and amount, if the
19 objecting party, here, the Trust comes forward with evidence
20 that refutes at least one essential element of the claim, the
21 burden shifts to the claimant to come forward with evidence of
22 equal or greater force.

23 You've put forward in your papers, Mr. Wishnew, a
24 written agreement between Homecomings and OMC which disclaims
25 an agency relationship.

1 MR. WISHNEW: Correct, for a very limited purpose,
2 Your Honor.

3 THE COURT: Well, it's an -- OMC was an agent for --

4 MR. WISHNEW: I'm sorry, yes.

5 THE COURT: -- for what --

6 MR. WISHNEW: Yes.

7 THE COURT: -- for a limited purpose.

8 MR. WISHNEW: Correct, correct.

9 THE COURT: And that limited purpose was what?

10 MR. WISHNEW: Only for the notice. So referring Your
11 Honor to Exhibit G -- let me just make sure I'm referring to
12 the right declaration. So it's Exhibit G to the Lathrop
13 declaration at docket number 9280-2.

14 THE COURT: Just let -- let me turn, okay?

15 Okay.

16 MR. WISHNEW: Paragraph 1, titled Relationship of
17 Parties on --

18 THE COURT: Wait. I'm in the wrong Exhibit G. Give
19 me a second, okay? It's a big binder.

20 MR. WISHNEW: I understand, Your Honor.

21 THE COURT: Okay, I'm with you.

22 MR. WISHNEW: Okay. Paragraph 1, titled Relationship
23 of Parties, "Broker-Lender", which is Ohio Mortgage Company,
24 Inc. -- "Broker-Lender shall conduct all business with
25 Homecomings as a nonexclusive independent contractor, and not

1 as an agent, partner or affiliate of Homecomings, and shall not
2 use Homecomings' name in any advertising without Homecomings'
3 express written consent.

4 "This broker-lender agreement is broker-lender's
5 authorization to act as Homecomings' agent for the purpose of
6 delivering notices of action taken as required by the Equal
7 Credit Opportunity Act and its Regulation B."

8 THE COURT: Okay.

9 MR. WISHNEW: So Your Honor, very clearly, Homecomings
10 did not have an exclusive arrangement with OMC. OMC could have
11 brokered to any number of potential lenders. OMC was Ms.
12 McNerney's agent, not Homecomings.

13 THE COURT: Yes, so I read a portion of the state
14 court trial transcript. It's attached to the declaration. And
15 the portion of the transcript I read was the cross-examination
16 of Ms. McNerney. And she, in that testimony, acknowledged that
17 she reached out to OMC in her effort to find a replacement
18 loan. She had to refinance because of a divorce, as I
19 remember.

20 MR. WISHNEW: Right. So the fact of the matter is,
21 Your Honor, Ms. McNerney went to OMC. It's obvious from the
22 arguments that she was very displeased with how OMC performed,
23 but there's no connection --

24 THE COURT: Well, she's --

25 MR. WISHNEW: -- there's --

1 THE COURT: -- unhappy now. If she was then, I don't
2 know.

3 MR. WISHNEW: Right. And the fact is there's no
4 connection or there's no facts to suggest that somehow
5 Homecomings ever held itself out as OMC's principal. So the
6 facts just don't exist. And so to the extent claimant is
7 trying to tie liability for these seven causes of action under
8 the principal agency theory, it fails, Your Honor.

9 THE COURT: Well, I didn't see -- and Ms. Gray will
10 point out to me if there is any -- I didn't see anything in
11 that state court trial transcript of Ms. McNerney's examination
12 where she said that either OMC said it was acting on behalf of
13 Homecomings or where she testified in any other way -- she
14 said -- I think she said she had no contact with Homecomings.

15 MR. WISHNEW: That's correct, absolutely.

16 THE COURT: So what is it in the record that could
17 refute the contractual language where the only thing that OMC
18 was an agent for Homecomings was for delivery of notices?

19 MR. WISHNEW: I don't believe --

20 THE COURT: I guess the focus of the claims, as I
21 understand it is, is that OMC may have used Homecomings'
22 application software to fill in information that was submitted
23 with the loan application.

24 MR. WISHNEW: That's right, but that's after the fact.
25 And really, the nucleus of operative facts we're dealing with

1 here in which claimant is trying to tie liability to
2 Homecomings is everything that took place during the
3 application process, when Ms. McNerney was dealing with
4 Homecoming -- sorry, when Ms. McNerney was dealing with OMC,
5 she was not dealing with -- as Your Honor pointed out, she was
6 not dealing with Homecomings; she was dealing with OMC. And so
7 there's nothing in the record to our -- in our position, that
8 suggests that she knew of the Homecomings-OMC relationship,
9 that it was in any way exclusive.

10 In fact, the argument -- the agreement says just
11 the contrary.

12 THE COURT: Well, that could be -- I mean, it doesn't
13 have to be exclusive for OM -- for OMC to have been
14 Homecomings' agent in connection with this loan wouldn't
15 require that OMC be the exclusive -- have an exclusive
16 relationship with --

17 MR. WISHNEW: Right.

18 THE COURT: -- with Homecomings.

19 MR. WISHNEW: But I mean, clearly, Ms. McNerney had
20 absolutely no knowledge of a relationship. And so it was her
21 seeking out the assistance of OMC, her dealing with OMC, and
22 then, subsequently, OMC reaching out to Homecomings to see if
23 they would accept the loan. That's the extent of the
24 connection between the three parties.

25 There's not a sufficient connection between OM -- I'm

1 sorry, between Ms. McNerney and Homecomings to warrant any sort
2 of finding that OMC was Homecomings' agent.

3 Your Honor, I'm not sure -- I mean, I can go through
4 the different causes of action and highlight our principal
5 arguments, unless you just want to ask questions you might have
6 as to the --

7 THE COURT: Well, I -- Ms. Gray cites in her brief the
8 Sixth Circuit's decision in Brainard v. American Skandia Life
9 Assurance Corp., 432 F.3d 655 (6th Cir. 2005). And the Court
10 there, at pages 661 through 663, dealing exclusively with Ohio
11 law, which is the applicable set of legal principles that I
12 need to apply here -- and this really -- and the court in
13 Brainard relies on Ohio State Court decisions and also, I
14 think, some federal court decisions as well. And the court
15 goes through and talks about an agency relationship may arise
16 pursuant to several theories.

17 First, actual agency occurs where a consensual
18 relationship exists between the agent and the principal.
19 Agency relationships may also arise from apparent agency or
20 agency by estoppel. And I won't go through it, but the court
21 goes through analyzes each of those and sets out what has to be
22 shown. The agency by estoppel, the court deals with in
23 footnote 4. And while Ms. Gray -- to argue on it, I mean, that
24 seems clearly inapplicable here, the agency by estoppel theory.

25 But I do want you, Mr. Wishnew, to talk about apparent

1 agency, because what does -- what is it that Ms. McNerney would
2 have to establish --

3 MR. WISHNEW: Sure.

4 THE COURT: -- to show apparent agency?

5 MR. WISHNEW: Sure. And the court -- the Brainard
6 court addresses that, Your Honor, on 662 and 663. This is at
7 headnotes 8 and 9, where it says, "For similar reasons, no
8 parent authority agency" -- I'm sorry, let me skip ahead.

9 THE COURT: Don't read headnotes.

10 MR. WISHNEW: Yeah.

11 THE COURT: Read the opinion.

12 MR. WISHNEW: "For an agent to bind the principal in
13 the context of apparent authority, the presented evidence must
14 reflect '(1) that the principal held the agent out to the
15 public as possessing sufficient authority to embrace the
16 particular act in question, or knowingly permitted him to act
17 as having such authority, and (2) that the person dealing with
18 the agent knew of the facts and ... in good faith had reason to
19 believe and did believe that the agent possessed the necessary
20 authority.'" And I'll omit the citations, Your Honor.

21 Your Honor, with regards to these two elements, it's
22 our position that -- the Trust's position that the facts in the
23 record support neither element. The fact of the matter is that
24 we've not seen any evidence that Homecomings held OMC out to
25 the public as possessing sufficient authority to embrace the

1 particular act in question or even knowingly permitted OMC to
2 act as having such authority; and two, that Ms. McNerney, who
3 dealt with OMC, clearly has said she did not know of the OMC-
4 Homecomings relationship. So I think it's fairly evident from
5 the fact --

6 THE COURT: This is a little different than I often
7 have, because here, there was the state court trial. It didn't
8 result in a decision, but there's a transcript, which is --
9 which I do have in front of me, which I have read.

10 MR. WISHNEW: Right, Your Honor. And so I think the
11 facts that are gleaned from that transcript suggest that Ms.
12 McNerney lack of knowledge clearly argues against a finding of
13 apparent authority.

14 THE COURT: Okay. So is there anything else you want
15 to say? I understand that in your brief you talk a little bit
16 more than just the agency theory. But as to those causes of
17 action that are linked to finding that -- would require a
18 finding that OMC was Homecomings' agent.

19 MR. WISHNEW: Um-hum.

20 THE COURT: Are there any other arguments you want to
21 make with respect to that, other than the agency argument?

22 MR. WISHNEW: I mean, Your Honor, I'm happy to reply
23 upon the arguments --

24 THE COURT: Okay.

25 MR. WISHNEW: -- in both our objection and reply.

1 THE COURT: All right. So what about the other causes
2 of action?

3 MR. WISHNEW: So Your Honor, with regards to the other
4 causes of action, you have Ms. -- with regards to the causes of
5 action for TILA and RESPA, it's our position that those causes
6 of action are barred by the applicable statutes of limitation.
7 Ms. McNerney's cause of action for unconscionability fails
8 because she's not demonstrated the loan was either procedurally
9 or substantively unconscionable.

10 With regards to the claim for fraud in the court,
11 courts in Ohio have opined that this does not give rise to a
12 private cause of action.

13 For the cause of action for breach of privacy, the
14 allegations with regards to this claim demonstrate neither the
15 disclosure of private information nor a wrongful intrusion on
16 her seclusion.

17 Finally, the claim for civil conspiracy fails because
18 there's not been any evidence of an actual agreement between
19 OMC and Homecomings to commit a wrongful act.

20 So for the reasons discussed throughout the objection
21 and reply and the supporting declarations, we'd ask that the
22 objection be granted and the four claims at issue be stricken
23 entirely from the debtors' claims registry.

24 THE COURT: All right.

25 Ms. Gray.

1 MS. GRAY: Thank you, Your Honor. Starting first with
2 the agency theory, the evidence in this case is not fully
3 before the Court. I was not actually anticipating a full
4 evidentiary hearing today, but I --

5 THE COURT: Well, it's not -- this is not an
6 evidentiary hearing.

7 MS. GRAY: Okay. And --

8 THE COURT: I want to make that clear.

9 MS. GRAY: Okay.

10 THE COURT: But what the standard on claim
11 objections -- I can't count the number of opinions I've issued
12 in ResCap where I lay out, basically, the so-called shifting
13 burden with respect to claim objections. So a properly
14 prepared proof of claim may be entitled to prima -- it's prima
15 facie as to validity and amount. The objector then must rebut
16 at least one essential element of the claim here of each of the
17 causes of action. And if they do so, then the burden shifts to
18 the claimant to come forward with evidence of equal or greater
19 weight.

20 MS. GRAY: That is --

21 THE COURT: So with respect to -- at least with
22 respect to the actual agency argument, here, properly, in my
23 view, the Trust has come forward with the written agreement
24 between OMC and Homecomings, which disclaims an agency
25 relationship sufficient to encompass the claims that have been

1 asserted here by your client.

2 For better or worse, I have the trial transcript from
3 the state court first foreclosure action, when your client was
4 examined. And she very forthrightly said she didn't have any
5 contact with Homecomings. She didn't -- there's nothing to
6 indicate that OMC said that they were acting for Homecomings.
7 She went to them as a mortgage broker. They inputted her
8 information. I know you say that they -- that the information
9 they input was inaccurate, purposely or otherwise. I can't
10 speak to that. Your client got the loan.

11 What's the evidence -- how have you rebutted the
12 Trust's showing that OMC was not Homecomings' agent in
13 connection with arranging for a loan for Ms. McNerney?

14 MS. GRAY: Several things. One is the trial testimony
15 also showed -- and this is the section having to do with
16 whether Homecomings gave a kickback, which would be a violation
17 of RESPA. Homecomings paid OMC Lending a lot of money to make
18 this loan. And in support of the allegation that it was not a
19 kickback, Homecomings brought out testimony that OMC Lending
20 did all this work for Homecomings and on behalf of Homecomings,
21 thereby --

22 THE COURT: They did a lot of work to complete an
23 application that was submitted to Homecomings --

24 MS. GRAY: On behalf of Homecomings, thereby
25 justifying --

1 THE COURT: Show me that --

2 MS. GRAY: -- the fee.

3 THE COURT: -- show me that testimony, okay? Because
4 that's -- my recollection is not the way you've just described
5 it.

6 MS. GRAY: That --

7 THE COURT: Just stop for a second. Paying OM -- OMC
8 wasn't doing this gratis. There's no question about it. But
9 paying them a fee in connection with the loan that Homecomings
10 made to your client is not inconsistent with an independent
11 contractor relationship between a mortgage broker and a lender.
12 Is it? Do you have any case --

13 MS. GRAY: Yes.

14 THE COURT: -- that supports the notion that paying
15 a -- you call it a kickback; I don't call it a kickback, but
16 that's besides the point for now -- is there -- do you have any
17 case that would say that by paying OMC a fee in connection with
18 the loan that Homecomings made to McNerney that that makes OMC
19 Homecomings' agent?

20 MS. GRAY: The RESPA regulations -- I read that --

21 THE COURT: Don't talk to me about RESPA. You have --
22 we'll talk about RESPA separately, because you've got statute
23 of limitations problems with respect to RESPA, okay? Let's
24 deal with your fiduciary duty, Consumer Fraud Act, all of
25 negligence, fraud. Do you have any case authority that would

1 support that the payment of a fee by Homecomings to OMC makes
2 OMC Homecomings' agent?

3 MS. GRAY: I think the payment of the fee --

4 THE COURT: Maybe you didn't hear what I said.

5 MS. GRAY: Well, Your Honor, maybe --

6 THE COURT: Let me ask it one more time. Do you have
7 any case authority -- I don't want to -- I'll let you argue,
8 but when I ask you a question specifically whether you have any
9 case authority that supports the argument you're making, I
10 expect an answer to that.

11 MS. GRAY: Your Honor --

12 THE COURT: And then I'll let you go on and argue.
13 Tell me, do you have a case that supports your argument?

14 MS. GRAY: Other than what is in my brief, Your Honor,
15 no.

16 THE COURT: Well, what case in your brief supports
17 your argument? Most of your brief was taken up with arguing
18 about whether I should lift the stay. You did address the
19 merits as well, but most of the brief was taken up with whether
20 the stay should be lifted, which I've already ruled on.

21 Point to me to a case or cases in your brief that you
22 believe establishes -- supports the position that OMC was
23 Homecomings' agent by virtue of Homecomings paying a fee.

24 MR. WISHNEW: I think that's part -- the Brainard -- I
25 guess I'm just relying on the Brainard case. That's part of

1 the constellation of events. And the important part of that
2 constellation has to do with the fact that, in completing the
3 desktop underwriter data and sending it to Homecomings for
4 approval, along with all of the underlying backup factual
5 information, Homecomings ratified the act of --

6 THE COURT: Your argument -- you're straying into
7 outer space on this now.

8 MS. GRAY: OMC --

9 THE COURT: I mean, the Brainard case, at page 661, on
10 the actual authority discussion, "Simply stated, 'express
11 authority is that authority which is directly granted to or
12 conferred upon the agent or employee in express terms by the
13 principal, and it extends only to such powers as the principal
14 gives the agent in direct terms[.]'" citing the Davis case, an
15 Ohio case. So I don't read Brainard supporting your argument
16 at all with respect to the actual authority point.

17 What language in Brainard are you pointing to? You're
18 talking about a constellation of facts. Brainard's very clear,
19 and it rejects the actual authority argument because there was
20 nothing -- there was no agreement between the parties creating
21 actual authority. That seems to me pretty closely on point to
22 this case.

23 Here, there is a writing, and it disclaims an agency
24 relationship except with respect to giving a notice. And
25 Brainard shows you can be an agent for some purposes and not

1 for others. You need to be able to make OMC Homecomings' agent
2 for purposes of making the loan, not just notices.

3 Go ahead. Do you have any other case, or Brainard's
4 the only case you're relying on?

5 MS. GRAY: I think that even if -- and of course, this
6 agency contract was never shown to Ms. McNerney or the
7 limitation was never shown --

8 THE COURT: But she didn't even know about
9 Homecomings.

10 MS. GRAY: -- to Ms. McNerney. However, even if they
11 were just the agent for giving notices, they didn't give proper
12 notices. They did not give a proper notice of right to cancel.
13 They did not give a proper Truth in Lending disclosure
14 statement. They did not --

15 THE COURT: Well, the problem you have with the TILA
16 and RESPA claims -- and I'll address that separately -- is the
17 statute of limitations.

18 MS. GRAY: Your Honor I will happily address that.

19 THE COURT: These facts are old, and the Trust makes
20 the argument that those claims -- having nothing to do with
21 agency -- but those claims are barred by the applicable
22 statutes of limitations.

23 But let's just -- let's finish talking about --

24 MS. GRAY: Okay.

25 THE COURT: And I do want you to address those

1 arguments.

2 MS. GRAY: Okay. A fair -- but --

3 THE COURT: But let's just finish up on --

4 MS. GRAY: Okay.

5 THE COURT: Let me ask you this: do you have anything
6 else that you believe points to actual -- an actual authority-
7 agency relationship between OMC and Homecomings?

8 MS. GRAY: Yes, I would just like to finish that if
9 they were, in fact, the agent for giving notices, they
10 negligently gave notices. They negligently gave -- every
11 notice that they gave was backdated, was inaccurate, and failed
12 to fulfill their duty to accurately give notices. They gave
13 wrong notices. And the fact of giving wrong --

14 THE COURT: Which causes of action deal with wrong
15 notices?

16 MS. GRAY: All of the --

17 THE COURT: Do they really?

18 MS. GRAY: All of the agency --

19 THE COURT: Oh, come on.

20 MS. GRAY: All of the agency causes of action deal
21 with the negligent and intentional misrepresentation in the
22 delivery of those notices and delivery of information about the
23 loan, including the false information in the desktop
24 underwriter, which would have disqualified --

25 THE COURT: That's not notice.

1 MS. GRAY: -- her for the loan.

2 THE COURT: That's not a notice. What's a notice that
3 was sent to your client that you believe was false or
4 fraudulent?

5 MS. GRAY: Truth in Lending disclosure statement, the
6 notice --

7 THE COURT: Okay.

8 MS. GRAY: -- of right to cancel.

9 THE COURT: And your TILA claims, they argue, are time
10 barred. And I'm going to let you argue -- I want to try and
11 keep these things -- these arguments separately, okay? I'm
12 dealing first with the causes of action that clearly do hinge
13 on OMC being determined to be Homecomings' agent. That's not
14 the case for TILA and RESPA.

15 MS. GRAY: While that is true, Your Honor. Those are
16 the notices that they were required to deliver in fulfillment
17 of their agency, and therefore part of their agency --

18 THE COURT: Okay. If you got a TILA claim or a RESPA
19 claim, I'm going to ask you to address whether -- whether the
20 notices they gave were correct or not correct, TILA and RESPA
21 have statutes of limitations. The Trust has argued that the
22 statute of limitations bars those claims. Stick with the other
23 causes of action. We'll come to the TILA and RESPA claims.

24 MS. GRAY: Your Honor, in mortgage loan origination
25 case, the most important notices are the notices of right to

1 cancel, and those are the notices that were the express
2 obligation of the agent to deliver.

3 THE COURT: Required under --

4 MS. GRAY: So they are --

5 THE COURT: -- required under what law?

6 MS. GRAY: Required under the law of Truth in
7 Lending -- required in any mortgage loan -- RESPA --

8 THE COURT: Okay. So all you want to talk about is
9 TILA and RESPA. We'll come to that. I'm going to listen to
10 you in TILA and RESPA. But right now, Ms. Gray -- I don't know
11 how many times I have to ask the same question to get an answer
12 from you. You want to --

13 MS. GRAY: I believe --

14 THE COURT: -- talk about TILA and RESPA. I'll get to
15 TILA and RESPA. What I want you to address now are the other
16 causes of action. TILA and RESPA do not depend -- the
17 objection to the TILA and RESPA claim does not depend on
18 whether OMC was Homecomings' agent or not.

19 MS. GRAY: That is true.

20 THE COURT: So would you address the ones that do
21 depend on the agency relationship?

22 MS. GRAY: The negligence, the breach of fiduciary
23 duty, and failure to give proper --

24 THE COURT: Okay.

25 MS. GRAY: -- notices, including notices regarding

1 what the loan was about, what the terms would be, all -- not
2 just the Truth in Lending disclosure statement, not just the
3 notice of right to cancel, but all notice regarding what the
4 terms of the loan would be, when the closing would be, what the
5 first payment would be, all that information that the broker
6 was required to give and did not give.

7 THE COURT: Okay. This says that "This broker-lender
8 agreement is broker-lender's authorization to act as
9 Homecomings' agent for the purposes of delivering notices and
10 action taken as required by the Equal Credit Opportunity Act
11 and its Regulation B." Okay? Tell me what notices -- I didn't
12 see anything in your claim stating that the notices required by
13 the Equal Credit Opportunity Act and its Regulation B were not
14 delivered.

15 MS. GRAY: The agency was not limited just to that
16 notice, Your Honor.

17 THE COURT: What does it say? You're saying that --

18 MS. GRAY: But I'm also saying what happened. I'm
19 also saying the facts, the facts that they gave a HUD-1
20 statement showing Homecomings as the lender, that they showed
21 that -- that Homecomings approved the HUD-1 statement --

22 THE COURT: All right.

23 MS. GRAY: -- and, in fact, created --

24 THE COURT: I'm giving you one last chance. Is there
25 anything else you want to tell me about the agency theory that

1 supports anything other than the notices that you want to
2 complain about? Last chance.

3 MS. GRAY: No, I think I'm done.

4 THE COURT: All right. Now, let's go on. You want to
5 talk about the notices, let's talk about this -- I want to hear
6 from you about the statute of limitations for TILA and RESPA
7 claims.

8 MS. GRAY: All right. The important -- there are
9 several important statutes of limitations. One is the one-year
10 statute of limitation for failure to properly disclose. The
11 other is the three-year statute of limitations for the right to
12 rescind. Ms. McNerney rescinded well within the three-year
13 period.

14 THE COURT: When did she seek to rescind?

15 MS. GRAY: She rescinded when she filed her
16 counterclaim in the county court, and I do refer Your Honor to
17 Jesinoski v. Countrywide, which is a United States Supreme
18 Court unanimous decision, 1/13/15, that says, "A borrower need
19 only give notice in writing. They do not" -- "she need not
20 file suit within three years" --

21 THE COURT: Give me the cite again.

22 MS. GRAY: It's J-E-S-I-N-O-S-K-Y (sic) v.
23 Countrywide. It's a 2015 case. It's a slip opinion issued
24 1/13/15, and a unanimous Supreme Court.

25 THE COURT: All right. All right.

1 MS. GRAY: So --

2 THE COURT: So tell me --

3 MS. GRAY: -- she rescinded well within --

4 THE COURT: Stop.

5 MS. GRAY: -- that three-year period.

6 THE COURT: Stop, stop. I want the dates. When --

7 the loan closed on what date?

8 MS. GRAY: January 3, 2003.

9 THE COURT: And when did she seek to rescind, in your
10 view?

11 MS. GRAY: She rescinded.

12 THE COURT: When?

13 MS. GRAY: On -- the case was filed on 11/10/2003.

14 She answered within twenty-eight days of that period, and that
15 is when she rescinded.

16 THE COURT: And the Countrywide decision deals with
17 rescission under which statute?

18 MS. GRAY: 15 U.S.C. 1635(b), the Truth in Lending
19 Act.

20 THE COURT: Okay. What is the statute -- what's the
21 applicable statute of limitations for RESPA?

22 MR. WISHNEW: One year -- one year.

23 THE COURT: And do you agree that the statute of
24 limitations have run on the RESPA claim?

25 MS. GRAY: No, because it relates to the date of the

1 complaint. It did not --

2 THE COURT: It does not -- was it in the -- did you
3 assert a RESPA claim?

4 MS. GRAY: In the counterclaim? Yes. Yes.

5 THE COURT: In the counterclaim? When was the
6 counterclaim filed?

7 MS. GRAY: The counterclaim was filed twenty-eight
8 days after 11/10/2003.

9 THE COURT: And what was the RESPA violation?

10 MS. GRAY: We asserted a kickback.

11 THE COURT: And what was the TILA violation?

12 MS. GRAY: The TILA violation was that they failed to
13 deliver clear and conspicuous notices of right to cancel, that
14 they failed to deliver two copies of the notice of right to
15 cancel, and that the notice of right to cancel did not clearly
16 and conspicuously disclose the time to cancel it and the
17 opportunity to cancel it, especially given that the expiration
18 date on the notice of right to cancel was the 29th of December,
19 and the loan closed on January 3rd, about five days later.

20 THE COURT: Okay. Just bear with me a second, okay?

21 (Pause)

22 THE COURT: Is there anything else you want to say
23 about either the TILA or RESPA claims?

24 MS. GRAY: The time limit for rescission may be found
25 in 1635(f), which says, "In all regards, right of rescission

1 shall expire three years after the date of consummation." So
2 that -- I had -- I hadn't mentioned that quoted citation. It's
3 15 U.S.C. 1635(f).

4 1635(b) states the roadmap for rescission, and 1635(f)
5 states the time for the exercise of the right to rescind.

6 THE COURT: So who owns the loan now?

7 MS. GRAY: The testimony in the trial is that
8 Homecomings owned it and that --

9 THE COURT: Well, it doesn't anymore, but --

10 MS. GRAY: -- they owned it all along. I have no
11 idea. They may not; I have no idea.

12 THE COURT: How get you rescission if they don't own
13 the loan?

14 MS. GRAY: The borrower has already rescinded, and
15 every act after that is subject to damages, every act that
16 relates to her effort to enforce her right to rescind. I have
17 no reason to doubt that Homecomings or its successor-in-
18 interest, which is the ResCap Liquidation Trust, owns this.
19 And up until the time, Ms. McNerney had accumulated substantial
20 damages, and that's what her claim is about. The rescission is
21 over. That's what the Jesinoski case says. It's over.
22 Everything after that is her damages.

23 THE COURT: Is it correct that the negligence in fraud
24 claims against Homecomings both seek to impose by curious
25 liability on agency theory? The fraud that you've alleged is a

1 fraud by OMC --

2 MS. GRAY: And in act --

3 THE COURT: -- for which you say Homecomings was
4 liable because OMC was its agent.

5 MS. GRAY: The trial transcript discloses actual fraud
6 by Homecomings.

7 THE COURT: What fraud?

8 MS. GRAY: Actual fraud in failing to change, failing
9 to accurately input the desktop information -- the desktop
10 underwriter information. Every -- and this is what -- I think
11 her name was Theresa Harrington (ph.) from Homecomings
12 testified to that: I looked at the divorce decree, and I knew
13 how long she was going to get child support. I looked at the
14 verbal information of employment. I looked at her tax returns,
15 and I looked at her paystubs, and I looked at the fact that the
16 supposedly liquid asset is, in fact, an IRA. And I knew those
17 things were entered wrong. And I didn't change it.

18 THE COURT: Okay.

19 MS. GRAY: And she wouldn't have qualified for the
20 loan if I had done it right.

21 THE COURT: All right. Tell me again, whose testimony
22 was that?

23 MS. GRAY: I think it was Theresa Harrington who -- or
24 whoever came in for Homecomings, the person --

25 THE COURT: Okay.

1 MS. GRAY: -- who testified for Homecomings --

2 THE COURT: So that --

3 MS. GRAY: -- in the trial.

4 THE COURT: So you believe that those -- what you've
5 just described reflects both -- assuming a duty -- would
6 reflect both negligence and fraud on the part of Homecomings,
7 not vicariously, because of OMC's conduct, but directly because
8 of Homecomings' own conduct?

9 MS. GRAY: That's -- yes, Your Honor.

10 THE COURT: Okay. So that's what, both as to the
11 negligence and fraud claims?

12 MS. GRAY: Yes, Your Honor.

13 THE COURT: Okay. What about your fraud on the court
14 argument? I don't understand -- I frankly don't understand
15 your argument, how you've alleged fraud on the court with
16 respect to Homecomings, or how that's cognizable here. I mean,
17 I think the Trust comes forward with case law from Ohio that
18 it's not a separate cause of action.

19 MS. GRAY: That's true. It's not clear in Ohio. It's
20 not clear that it's not.

21 THE COURT: Do you have any cases in Ohio that say
22 it's a separate cause of action?

23 MS. GRAY: I think the law is evolving, Your Honor,
24 and that is not -- it's a question that probably should be
25 submitted to the Ohio Supreme Court at this time.

1 THE COURT: Well, I don't submit it. I decide.

2 MS. GRAY: Okay.

3 THE COURT: You can appeal to second -- you can appeal
4 to the district court if you don't like my decision.

5 Let me ask again, the Trust has come forward with case
6 law saying that fraud on the court does not create a separate
7 cause of action in Ohio. Do you have any case law to the
8 contrary?

9 MS. GRAY: No, I do not.

10 THE COURT: Okay. Let's deal with the Ohio Consumer
11 Sales Practices Act claim. The Trust argues that the claim
12 fails as a matter of law because the granting of a mortgage is
13 considered a pure real estate transaction not subject to the
14 Ohio Consumer Sales Practices Act claim.

15 MS. GRAY: That is not Ohio law, Your Honor.

16 THE COURT: Do you -- what case? Could you point me
17 to a case?

18 MS. GRAY: Not off the top of my head --

19 THE COURT: The Trust --

20 MS. GRAY: -- Your Honor.

21 THE COURT: Well, you know, top of your head -- you
22 filed --

23 MS. GRAY: Yes, I did.

24 THE COURT: -- an opposition to the -- a response to
25 the objection. The Trust cites, in support of its position,

1 Brown v. Liberty Clubs, Inc., 543 N.E.2d 783 at page 785, Ohio
2 (1989): "All parties correctly agree that the Consumer Act has
3 no application in a pure real estate transaction." Pure real
4 estate transaction is a term of art in Ohio.

5 The Trust also cites Hanlin, H-A-N-L-I-N v. Ohio
6 Builders and Remodelers, Inc., 212 F.Supp.2d 752 at 757 (S.D.
7 Ohio 2002), granting summary judgment to a lender under
8 borrower's CSPA claims because the loan was a pure real estate
9 transaction.

10 So let me ask you again --

11 MS. GRAY: May I file a supplemental brief on this,
12 Your Honor?

13 THE COURT: No. No. I got -- you see this mountain
14 of paper I have?

15 MS. GRAY: Yes, I do. Yes. And I got a mountain of
16 paper just like that and I'm --

17 THE COURT: No, you didn't.

18 MS. GRAY: -- doing my best.

19 THE COURT: This is all my hearings in ResCap today.

20 MS. GRAY: I got --

21 THE COURT: You had your chance. Can you point me to
22 a case in Ohio that would say that a mortgage transaction such
23 as the one here does not fit this term of art "pure real estate
24 transaction" that's not covered by the Ohio Consumer Sales
25 Practices Act?

1 MS. GRAY: So, a case then comes to mind, Bridge v.
2 Ocwen, I could get it for you, Your Honor, in a short time. I
3 don't -- and I don't even know if that's the one I need. It's
4 something involving Ocwen. But it has to do with the fact that
5 where there is a broker involved and where there -- and where
6 it's a loan origination and they're violate -- and their
7 misrepresentations in the course of the transaction, it comes
8 under the CSPA. It does -- it is not -- it is definitely not a
9 pure real estate transaction.

10 THE COURT: What do you think the name of the case is?

11 MS. GRAY: The name Bridge comes to mind, but
12 honestly, Your Honor, I can't give it to you without looking it
13 up.

14 THE COURT: I'll give you until tomorrow at noon to
15 submit a letter with --

16 MS. GRAY: Okay.

17 THE COURT: -- the name of the case and citation.

18 MS. GRAY: Okay, thank you.

19 THE COURT: What's deal with your Ohio Mortgage Broker
20 Act claim? The Trust contends that the Ohio Mortgage Broker
21 Act only applies to mortgage brokers and that mortgage lenders
22 are not subject to the claim. And Ohio Revised Code annotates
23 Section 1322.01(G) defines a mortgage broker. Keating v.
24 America's Wholesale Lender, 2011 WL 2471732 at *2, Northern
25 District of Ohio, June 21, 2011 says: "Under the OMBA, the

1 lender is not a mortgage broker for purposes of the act."

2 Do you have any case law that would support
3 Homecomings falling -- as the lender, falling under the Ohio
4 Mortgage Broker Act?

5 MS. GRAY: Your Honor, I think it is question of fact
6 whether Homecomings was, in fact, the lender. This loan
7 was -- and that's in the testimony at the trial, too. This
8 loan was set up to be sold to Fannie Mae and it was sold.

9 THE COURT: They were the lender. They may have sold
10 it.

11 MS. GRAY: No, they sold it to Fannie Mae.

12 THE COURT: I'm finding right now they were the --
13 that argument was frivolous. Homecomings was the lender. They
14 subsequently secured ties to the loan. OMC was the mortgage
15 broker. Do you have any case law that supports -- you didn't
16 cite any. Do you have a case that supports your position that
17 Homecomings, as a lender, is subject to the Ohio Mortgage
18 Broker Act.

19 MS. GRAY: I'm going to waive that argument, Your
20 Honor.

21 THE COURT: You agree that your loss mitigation
22 argument is moot?

23 MS. GRAY: Loss mitigation? There's no possibility
24 for it, right? They -- right?

25 THE COURT: Address your unconscionability claim. So

1 what I understand from Ohio case law, specifically Cheap Escape
2 Co. v. Crystal Windows & Doors Corp., 2010 WL 4018693 at *2,
3 Ohio Court of Appeals, October 14th, 2010: "Unconscionability
4 includes an absence of meaningful choice on the part of one to
5 a contract combined with contract terms that are unreasonably
6 favorable to the other party." It doesn't seem to me that
7 you've alleged any facts in the claim or in response to the
8 objection that would satisfy the requirements under Ohio law
9 for unconscionability of a claim -- an unconscionability claim.

10 MS. GRAY: The objection to claims stated that the
11 claims failed as a matter of law.

12 THE COURT: Substantive unconscionability depends on
13 whether the terms of the contract were unfair or unreasonable.
14 Homecomings made the loan to McNerney. The monthly payments --
15 they lowered her monthly payments, including escrow and
16 insurance, and paid off her unsecured debts. And she wound up
17 with a lower monthly payment than she had before. How can that
18 be unconscionable?

19 MS. GRAY: It was unconscionable because it was still
20 a payment that she could not afford, that everybody knew she
21 could not afford it, and she was not hit with information about
22 private mortgage insurance or that she would have to cash in
23 her IRA until the closing date. At that point, she was on a
24 train. She was on a coaster. She didn't know that she had --
25 she didn't know that she had a right to rescind. She didn't

1 know that she had the right to cancel.

2 They buried that document -- a single document on page
3 59 of a huge stack of documents.

4 THE COURT: Buried what document?

5 MS. GRAY: Her notice of right to cancel.

6 THE COURT: Oh. So you acknowledge she got a notice
7 of right to --

8 MS. GRAY: She got one.

9 THE COURT: -- cancel?

10 MS. GRAY: She got one notice of right to cancel and
11 it did not -- and it -- and the cancellation date was five days
12 before the date of the closing. She did -- they did not
13 comply. Truth in Lending requires two notices of right to
14 cancel and it requires that the notice clearly and
15 conspicuously state the deadline to cancel.

16 THE COURT: Okay. Let's address your breach of
17 privacy claim. What's the basis for that claim? You've had
18 no -- you've submitted nothing to show that Homecomings
19 disclosed any information about Ms. McNerney.

20 MS. GRAY: They sent people out to the house to take
21 pictures of the house. And the people who came and took
22 pictures called up to them and told them to pay their bills,
23 and told them to smile for the cameras, and drew attention to
24 the fact that the house is in foreclosure to the neighbors to
25 the right and the left. I believe that states intentional

1 breach of privacy, Your Honor.

2 THE COURT: Anything else you want to address?

3 MS. GRAY: No, Your Honor. Thank you.

4 THE COURT: Okay. Mr. Wishnew?

5 MR. WISHNEW: Thank you, Your Honor. Just briefly, a
6 few facts --

7 THE COURT: Why hasn't Ms. Gray refuted your argument
8 that applicable statutes of limitations bar the TILA and RESPA
9 claims?

10 MR. WISHNEW: Sure, Your Honor. And that's exactly
11 where I was going. There's one significant factual
12 misstatement by Ms. Gray in her presentation, and I refer the
13 Court to Exhibit E to the Wallace declaration. This is at
14 docket number 9280-4. It's been marked page 30 of 222.

15 THE COURT: I'll have to look at it after -- I'm
16 not -- what is it?

17 MR. WISHNEW: So it is -- this is at the Ohio State
18 Court docket, Your Honor. And Ms. Gray, in her presentation,
19 suggested that the answer was filed within thirty days of the
20 complaint being filed. That's not correct.

21 THE COURT: When was it filed?

22 MR. WISHNEW: It was filed -- answer and counterclaim
23 was filed June 16th, 2004, well over a year --

24 THE COURT: Hold on, do you --

25 MR. WISHNEW: -- well over a year past the

1 origination.

2 THE COURT: Let me ask you this, do you agree that the
3 counterclaim asserted the right to rescind?

4 MR. WISHNEW: Yes, Your Honor.

5 THE COURT: And what was the closing date of the loan?

6 MR. WISHNEW: I believe --

7 THE COURT: Ms. Gray said June 3rd, 2003.

8 MS. GRAY: January 5th.

9 MR. WISHNEW: It's January 5th.

10 THE COURT: I'm sorry, I'm reading my own notes wrong.
11 I wrote down January. January 3, 2003, do you agree with that?

12 MR. WISHNEW: That's -- I believe that's correct, Your
13 Honor.

14 THE COURT: All right. And you agree that the statute
15 of limitations for rescission was three years?

16 MR. WISHNEW: If she did not get notice, and our
17 assertion is that she got notice based upon the statements we
18 make at paragraph 18 of our objection.

19 THE COURT: So your position is that -- and what's the
20 notice you believe Ms. McNerney received?

21 MR. WISHNEW: Truth in Lending statement, a notice of
22 right to cancel, her HUD-1 settlement statement, the first
23 payment notice and a disclosure regarding PMI insurance.

24 THE COURT: And what did they say about the right to
25 rescind?

1 MR. WISHNEW: Give me one moment, Your Honor. Let me
2 just look at the exhibit. These are Exhibits I, J, K, L and M
3 to the Lathrop declaration at nine -- docket 9280-2. One
4 moment, Your Honor.

5 Your Honor, I refer to Exhibit J of the Lathrop
6 declaration. It looks like it's page 101 of 113. It states:
7 "You are entering into a transaction that will result in a
8 mortgage on your home. You have a legal right under the
9 federal law to cancel this transaction, without cost, within
10 THREE BUSINESS DAYS from whichever of the following events
11 occurs last: (1) the date of the transaction" -- which is
12 December 27, 2002 -- "or the date you received your Truth in
13 Lending Disclosure, or the date your receive this notice of
14 your right to cancel."

15 THE COURT: And when did she receive the notice of
16 right to cancel?

17 MR. WISHNEW: Your Honor, it's dated December 27th,
18 2002.

19 THE COURT: All right. So your position is she
20 doesn't -- she didn't -- because she received that notice, she
21 didn't have three years to rescind?

22 MR. WISHNEW: Correct, Your Honor. And also then,
23 Your Honor, to the extent that you were to find to the
24 contrary, the rescission does not occur until there's judicial
25 determination.

1 THE COURT: Well, actually the Supreme Court decided
2 otherwise. I've read Countrywide, because I've had this issue
3 before in ResCap before the Supreme Court decided.

4 MR. WISHNEW: Okay.

5 THE COURT: You don't need a judicial determination.
6 That was the split in authority. Do you disagree with what I
7 just said?

8 MR. WISHNEW: I don't, Your Honor. One other
9 point -- factual point for the record, Your Honor? Ms. Gray,
10 in her presentation, suggested that Homecomings still owned the
11 loan. In fact, the loan was extinguished as we set forth in --

12 THE COURT: Oh, yes. Now, I know the history. The
13 house was condemned. They --

14 MR. WISHNEW: That's exactly right. In paragraph 31
15 of our objection, we state Homecomings learned that Ms.
16 McNerney had agreed to deed the property to a local land bank
17 at the request of Lakewood Alive and the deed was --

18 THE COURT: No, I'm familiar with those facts.

19 MR. WISHNEW: Okay. So at that point, the lien was
20 extinguished and so -- and we dismissed our claims. So at this
21 point, the only thing --

22 THE COURT: You're not seeking to recover --

23 MR. WISHNEW: No, the --

24 THE COURT: -- the loan amount as a personal
25 liability?

1 MR. WISHNEW: Exactly, Your Honor. So there's no
2 defensive counterclaims here. At this point, it's only
3 affirmative claims of Ms. McNerney and Ms. Gray.

4 THE COURT: The damages claim.

5 MR. WISHNEW: Exactly, Your Honor, yes.

6 THE COURT: That's true. All right, anything else you
7 want to add?

8 MR. WISHNEW: No. I believe the -- I'll reply on our
9 objections, Your Honor.

10 THE COURT: Right. I'm going to take the matter under
11 submission. Thank you.

12 MR. WISHNEW: Thank you, Your Honor.

13 THE COURT: Thank you, Ms. Gray.

14 MS. GRAY: Thank you, Your Honor.

15 MR. WISHNEW: Your Honor, two more matters on today's
16 calendar. Your Honor, the first -- the next matter is item 7
17 on page 11 on today's agenda. This deals with a borrowers'
18 trust ninetieth omnibus objection to claims, no liability
19 claims, docketed at docket number 9296, filed on October 30th,
20 2015.

21 Your Honor, through the ninetieth omnibus claims
22 objection, the borrower trust seeks to expunge any proofs of
23 claim that do not represent valid pre-petition claims against
24 the debtors if they do not prove by a preponderance of the
25 evidence any specific wrongdoing by the debtors. The borrower

1 trust thoroughly examined the various books and records in an
2 effort to validate the accuracy of the allegations made in the
3 responses in the claims at issue, and determined the books and
4 records do not show any liability owing to the respondents.

5 The borrower trust determined that one claim should be
6 allowed in the filed amounts, which is reflected on Exhibit B,
7 and another amount should be asserted in an amount
8 lesser -- oh, I'm sorry -- also determined that one claim is
9 asserted in an amount greater than that for which the estate is
10 liable, and the hearing on that claim has been adjourned to
11 January 21st, 2016. That's the Mary Biancavilla claim.

12 THE COURT: Biancavilla's been adjourned?

13 MR. WISHNEW: Yes, Your Honor. There was -- it was
14 reflected on the agenda --

15 THE COURT: That's fine. Okay.

16 MR. WISHNEW: -- and there's a notice of adjournment
17 also filed.

18 THE COURT: Now, it's --

19 MR. WISHNEW: Apologies, Your Honor.

20 THE COURT: Okay, All right. So Biancavilla is
21 adjourned.

22 MR. WISHNEW: Correct. There were two responses we
23 received, Your Honor; one by Lori Tammaro at docket number
24 9398, one by Thomas and Catherine Cooper at docket number 9379.
25 I believe Mr. Cooper may have reached out to chambers

1 yesterday.

2 THE COURT: He did.

3 MR. WISHNEW: He spoke with me. So we have agreed to
4 push that to January 21st --

5 THE COURT: Okay. So --

6 MR. WISHNEW: -- as well.

7 THE COURT: Okay.

8 MR. WISHNEW: I'm not --

9 THE COURT: The Coopers filed an opposition to the
10 objection, and the Cooper opposition is at 9379.

11 MR. WISHNEW: That's correct, Your Honor.

12 THE COURT: And we understand -- because illness or --
13 in his family?

14 MR. WISHNEW: His wife just fell ill and -- yes.

15 THE COURT: Right. So I appreciate your agreeing
16 to --

17 MR. WISHNEW: No problem, Your Honor.

18 THE COURT: -- adjourn that.

19 MR. WISHNEW: So at this point, Your Honor,
20 the -- there are certain uncontested claims and one contested
21 claim by Lori Tammaro that are going forward. The Cooper claim
22 and the Biancavilla claim are going forward on January 21st.

23 THE COURT: Um-hum.

24 MR. WISHNEW: And Ms. Biancavilla's response deadline
25 is December 30th, which we agreed to. So --

1 THE COURT: And --

2 MR. WISHNEW: -- I'll pause for appearances. I'm not
3 sure if Ms. Tammaro has appear --

4 THE COURT: Ms. Tammaro, are you on the phone?

5 No response. Okay, no response from Ms. Tammaro.
6 Just bear with me a second, okay?

7 MR. WISHNEW: Sure.

8 THE COURT: All right, since Ms. Tammaro is not -- did
9 file a response to the objection but has not appeared, I'm not
10 going to hear argument and I'll resolve it in a written order.

11 MR. WISHNEW: Okay, very good, Your Honor. So that
12 then -- I guess with that, I'd ask for the Court to also
13 approve the uncontested claims in omnibus ninety for the
14 reasons set forth --

15 THE COURT: Okay.

16 MR. WISHNEW: -- that we addressed in Exhibit A.

17 (Pause)

18 THE COURT: All right, so with the exception of those
19 portions of the objection which have been adjourned until
20 January, the Trust's objections are sustained. I do want to
21 note with respect to the claim filed by Charles T. Clark, which
22 is listed in the claims register as a general unsecured claim
23 against GMACM, the Trust has determined that the claim should
24 be allowed as a general unsecured claim against GMACM in the
25 filed amount of 19,712 dollars. As I understand it, the Trust

1 advised Mr. Clark that his claim would be allowed in full and
2 provided him with a form of stipulation to acknowledge his
3 agreement. Clark informed the Trust that he would not agree to
4 sign the stipulation because he was not willing to accept the
5 treatment of his claim as provided in Article IIID2(f) of the
6 plan even though his claim would receive the same treatment as
7 similarly situated creditors.

8 As a result, the Trust requests that the Court enter
9 an order allowing the claim in the asserted amount so that it
10 will receive the treatment of an allowed claim against GMACM
11 debtors as provided in Article IIID2(f) of the plan.

12 The Trust's objection seeking to allow the Clark claim
13 in full is sustained, and that claim will be allowed as in the
14 manner provided in the objection.

15 MR. WISHNEW: Thank you very much, Your Honor.

16 THE COURT: Okay. Does that dispose of everything for
17 today?

18 MR. WISHNEW: One more matter.

19 THE COURT: One more, okay. Oh, yes, I've got the
20 other one. Go ahead. Sorry.

21 MR. WISHNEW: It's okay. Your Honor, the last matter
22 is an uncontested objection that the borrower trust filed
23 against claim 5857 of Mary McDonald individually and as
24 personal representative of the estate of Anthony McDonald.

25 Your Honor, this --

1 THE COURT: Before you go on, I've just been handed a
2 note that a Mr. John Hightower is on the phone on behalf of
3 Mary McDonald. Is that correct?

4 MR. HIGHTOWER: Yes, Your Honor. John Hightower is
5 here.

6 THE COURT: Are you an attorney?

7 MR. HIGHTOWER: Yes, sir.

8 THE COURT: You're Ms. McDonald's attorney?

9 MR. HIGHTOWER: That is correct. I represented Mrs.
10 McDonald in the filing of the original complaint against GMAC
11 and The Law Office of David Stern.

12 THE COURT: Okay.

13 MR. HIGHTOWER: And then when GMAC -- when ResCap
14 filed bankruptcy, obviously, it was moved to here.

15 THE COURT: And as I -- but you did not file any
16 response to the objection, correct?

17 MR. HIGHTOWER: I did not. I was not aware that I was
18 required to. I -- I'm just --

19 THE COURT: Do you think you just show up at
20 a -- there was an objection deadline shown on the objection.
21 You didn't file a response. You think you just show up at a
22 hearing by phone and -- well, let me hear -- what is it -- let
23 me ask you, Mr. Hightower, what is that you're -- what are you
24 planning to do today?

25 MR. HIGHTOWER: I wasn't sure. The notice of the

1 hearing was only sent to me on Monday. It didn't give an
2 indication as to what action will be taken on the matter.
3 I -- my -- based on experience, I'd assumed that it just might
4 be some type of case management conference where we would take
5 some direction as to planning out how the remainder of the
6 contested matter would be addressed and taking discovery, et
7 cetera.

8 THE COURT: It is not a contested matter if you don't
9 file a response to the objection to claim.

10 MR. HIGHTOWER: I --

11 THE COURT: Your client was served with -- well, I'll
12 check with Mr. Wishnew.

13 Was --

14 MR. WISHNEW: So Ms. --

15 THE COURT: -- Ms. McDonald served with the objection
16 to claim?

17 MR. WISHNEW: Mr. Hightower was served by e-mail on
18 November 10th -- I'm referring, Your Honor, to the affidavit of
19 service docketed at 9315. Mr. Hightower was served by e-mail
20 on November 10th and also, we served Mr. Hightower by overnight
21 mail at the address specifically included on the proof of
22 claim, 201 East Kennedy, Suite 1000, Tampa, Florida 33602.

23 THE COURT: And what is it you served him with,
24 because I got voluminous papers here?

25 MR. WISHNEW: We would serve --

1 MR. HIGHTOWER: Your Honor, I'll just shortcut. I
2 don't contest that I've been served. I don't want to waste the
3 Court's time. But the -- I -- unfortunately, this was all -- I
4 mean, very unfortunately, was overlooked as to the requirement
5 of filing a response. And the only thing I can do is just
6 submit to the Court's mercy to allow us an opportunity to file
7 the response.

8 One of the reasons why I was lured -- not
9 intentionally lured, but I wasn't aware that I needed to file a
10 response because I was engaged in settlement discussions with
11 counsel for GMAC well, well past the time that would've been
12 required for filing the response, then -- which certainly
13 indicated to me that there wasn't an uncontested objection,
14 given that we were engaged in these settlement discussions --

15 THE COURT: Well, look --

16 MR. HIGHTOWER: -- well past that deadline.

17 THE COURT: I don't know what we -- stop. I don't
18 know whether you were engaged in settlement discussions or not.
19 I prepare for a hearing. I have read all these papers, okay?
20 There was no response filed. There was a deadline shown for
21 filing a response. You didn't contact the Court and ask to
22 have it adjourned.

23 I go through all this work in preparing for a hearing
24 today, reading every scrap of paper that was filed in
25 connection with the objection to the McDonald claim, and you

1 think you can just get on the phone and say oh, I didn't know I
2 was supposed to file anything?

3 MR. HIGHTOWER: I -- and I'm very sorry that it comes
4 off as disrespectful, Your Honor. It is certainly --

5 THE COURT: Mr. Hightower?

6 MR. HIGHTOWER: -- not my intent.

7 THE COURT: Mr. Hightower, at the very top of the
8 notice of the ResCap borrower claims trust objection to proof
9 of claim number 5857 filed by Mary McDonald, et cetera, is the
10 following: Hearing date: December 16, 2015 at 10 a.m.

11 Response deadline: December 3, 2015 at 4 p.m. That's on --

12 MR. HIGHTOWER: December 3, 2015 was the deadline for
13 the response?

14 THE COURT: Yes. Yeah.

15 MR. HIGHTOWER: What is that document? I'm sorry,
16 Your Honor, I --

17 THE COURT: Mr. Hightower?

18 MR. HIGHTOWER: -- do not recall seeing that.

19 THE COURT: It's the notice of ResCap borrower claims
20 trust objection to proof of claim number 5857 filed by Mary
21 McDonald, individually and as personal representative of the
22 estate of Anthony McDonald. It's ECF docket number 9310-1
23 filed on November 10th, 2015. Okay? And attached to it is
24 about an inch-and-a -- about two inches of paper, every piece
25 of which I've read, that relates to this. And right at the

1 very top of the first page, it has hearing date, December 16th,
2 2015 at 10 a.m. and response deadline, December 3, 2015 at 4
3 PM. And --

4 MR. HIGHTOWER: That document, Your Honor, I do not
5 believe I was served, and maybe that's what counsel is
6 addressing, so I apologize if I jumped the gun on that one.
7 But that document, I do not believe I was served, and I
8 certainly wasn't served it through an ECF --

9 THE COURT: That's the objection. That's what we're
10 here on, the text of it, I said, it -- the top of the first
11 page, it says it. On page 2 of the notice, it also
12 says -- I'll leave words out -- responses, if any, to the
13 objection must be made in writing -- I'll leave a lot of words
14 out -- filed and served so as to be received no later than
15 December 3, 2015 at 4 p.m.

16 MR. HIGHTOWER: I did not receive that document, Your
17 Honor. I'm --

18 THE COURT: Mr. Wishnew, can you respond to that?

19 MR. WISHNEW: Your Honor, we -- the docket and the
20 affidavit of service indicating that Mr. Hightower was served
21 by both e-mail to hightower@mcintyrefirm.com,
22 M-C-I-N-T-Y-R-E-F-I-R-M dot com. He was served on November
23 10th by e-mail with this document, as well as served by
24 overnight mail at the address included on the subject proof of
25 claim. And both forms of service were effectuated.

1 THE COURT: Are you registered on ECF, Mr. Hightower?

2 MR. HIGHTOWER: Not for this case, Your Honor. If I
3 may ask counsel, what was the -- who was the sender of the
4 e-mail service?

5 MR. WISHNEW: It would've been Legal Vision Consulting
6 Group, who acts as the servicing agent for the ResCap Borrower
7 Claims Trust.

8 MR. HIGHTOWER: Is there an address that I can use to
9 search to identify whether I received it?

10 MR. WISHNEW: I don't know the specific sender e-mail
11 address, but I can say it was sent November 10th or
12 11th -- November 10th.

13 MR. HIGHTOWER: Yeah, I'm looking through my November
14 10th -- it's in my junk e-mail box.

15 THE COURT: That's nice.

16 MR. HIGHTOWER: So it is there. I don't know if it
17 was a mass sending and maybe that's the reason it was collected
18 in my junk e-mail, or --

19 MR. WISHNEW: It was not a mass sending.

20 MR. HIGHTOWER: -- what the case may be.

21 MR. WISHNEW: Very limited number of servers --

22 MR. HIGHTOWER: I'm moving it over now.

23 THE COURT: And they also say they served you by mail.

24 MR. WISHNEW: Overnight mail, Your Honor.

25 THE COURT: Overnight mail.

1 MR. HIGHTOWER: I have -- I don't have a response to
2 that one, Your Honor. I haven't seen it. I don't know if it
3 just -- well, what was the address it was sent to, I'm sorry?

4 MR. WISHNEW: It was the same address on the file
5 proof of claim, which is McIntyre, Panzarella, Thanasides,
6 Bringgold & Todd, P.L., 201 East Kennedy, Suite 1000, Tampa,
7 Florida 33602.

8 MR. HIGHTOWER: Oh, that's an old address. And
9 I -- admittedly, you know, I should've updated the mailing
10 address, removed -- of course, the claim was filed, I don't
11 know, maybe three years ago. Quite frankly, this kind of fell
12 off my attention as far as updating the address. We moved a
13 couple years ago.

14 MR. WISHNEW: Your Honor, I'd like to also address one
15 point. If I could direct a question to Mr. Hightower?

16 THE COURT: All right.

17 MR. WISHNEW: He indicates that he had
18 conversations -- held discussions with counsel for GMAC
19 Mortgage. It would've been someone at my firm, presumably, and
20 I've not spoken with Mr. Hightower. I'm not sure if he spoke
21 with maybe possibly our co-counsel at Bradley Arant.

22 THE COURT: Who have you spoken to, Mr. Hightower?

23 MR. HIGHTOWER: This was the attorney who originally
24 represented GMAC in the litigation hearing in the Middle
25 District of Florida. I cannot recall his name. He did

1 not -- part of the firm -- he was not a part of the
2 representation of ResCap at all. The representation he made to
3 me was that he was in discussions with counsel for ResCap and
4 there's -- carrying messages back and forth between them to me.

5 MR. WISHNEW: I'm sorry, who was this individual?

6 MR. HIGHTOWER: I can't --

7 THE COURT: Do you have a name?

8 MR. HIGHTOWER: I'm trying to remember. Let me see if
9 I can search my e-mails real quick. It was a firm out of
10 Alabama, I believe.

11 THE COURT: Bradley Arant. On the pleading -- on the
12 front of the pleading from Bradley Arant, it shows Ethan T.
13 Tidmore.

14 MR. HIGHTOWER: Tidmore, yes. I believe that's who it
15 was.

16 THE COURT: All right.

17 MR. HIGHTOWER: It was either Mr. Tidmore or someone
18 else in his firm. I believe there were a couple of attorneys
19 who were on that case at the time.

20 THE COURT: Very reluctantly, Mr. -- because look, Mr.
21 Hightower, I believe in resolving matters on the merits, not by
22 default. I'm going to adjourn this claim objection. What's
23 the next hearing date, Mr. --

24 MR. WISHNEW: January 21st, Your Honor.

25 THE COURT: January -- to January 21st. Bear with me

1 a second. I'm going to require any written response to the
2 objection by Thursday, January 7th, 2016 at 5 p.m., and nay
3 reply from the Trust to Friday -- to Thursday, January 14th at
4 5 p.m.

5 MR. WISHNEW: Okay.

6 MR. HIGHTOWER: I appreciate that very much, Your
7 Honor, and I hate that I've made a really bad first impression.
8 I just submit my sincere apologies and hope the Court will give
9 me an opportunity to make it up.

10 THE COURT: May I ask, where are you located?

11 MR. HIGHTOWER: Tampa, Florida.

12 THE COURT: Mr. Wishnew, do you have any objection to
13 counsel appearing by telephone at the next hearing?

14 MR. WISHNEW: No, Your Honor.

15 THE COURT: All right. I'll permit you to appear by
16 telephone. You need to arrange through CourtCall to do that.
17 It's --

18 MR. HIGHTOWER: Understood.

19 THE COURT: It's usually not my preference to hear
20 argument by telephone, but I do -- I mean, we extensively use
21 CourtCall for this. But you're in Florida. I'm not going to
22 make you come up here for it. May I ask you this?

23 MR. HIGHTOWER: I appreciate that.

24 THE COURT: Have you been able to recover any money
25 from The Law Offices of Stern?

1 MR. HIGHTOWER: No, Your Honor. We -- about two weeks
2 before trial, they stipulated to a judgment of 1.5 million
3 dollars, which was basically a reflection that they believe
4 that they're uncollectable.

5 THE COURT: Okay. Anything else for today, Mr.
6 Wishnew?

7 MR. WISHNEW: That's it, Your Honor.

8 THE COURT: All right. We're adjourned.

9 MR. WISHNEW: Thank you for your time.

10 MR. HIGHTOWER: Thank you, Your Honor.

11 (Whereupon these proceedings were concluded at 11:39 AM)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

RULINGS

	PAGE	LINE
Motion for relief from stay denied	14	14
The Trust's objection seeking to	59	14
allow the Clark claim in full is sustained		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Aliza Chodoff, certify that the foregoing transcript is a true and accurate record of the proceedings.



ALIZA CHODOFF

AAERT Certified Electronic Transcriber CET**D-634

eScribers

700 West 192nd Street, Suite #607

New York, NY 10040

Date: December 17, 2015